UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA, New York, N.Y.

v. 18 Cr. 0036(JPO)

DAVID MIDDENDORF and JEFFREY WADA,

Defendants.

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March 6, 2019
9:47 a.m.

Before:

HON. J. PAUL OETKEN,

District Judge
and a jury

APPEARANCES

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(Trial resumed; jury not present)

THE COURT: Good morning.

ALL COUNSEL: Good morning.

THE COURT: We're here for a charge conference to go over the jury instructions, which I sent a draft of on Friday to the parties and had gotten a letter from Mr. Middendorf's counsel over the weekend and from Mr. Wada's counsel over the weekend, another letter from Mr. Middendorf's counsel I believe last night, and then a letter from the government this morning.

Do I have everything I should have on that?

MS. ESTES: Yes, your Honor.

THE COURT: All right. So what's the best way to proceed? Is it just to go by page or big issues first, or what do you think?

MS. ESTES: I think by page would be a good way to start.

THE COURT: All right. Is that OK?

(Pause)

We've started implementing various changes, some of which we discussed last night, but we'll just use the version that was sent to you so you can do it by page.

All right. Where is the first issue anyone wants to discuss page wise?

MS. ESTES: Your Honor, we don't have anything until page 14.

MS. LESTER: I have two minor things on page 6 and 7.

THE COURT: OK.

MS. LESTER: On page 6, at the very end of instruction F, the last sentence. I would suggest that we end the sentence after "not guilty" because the paragraph addresses all the charges in the Indictment, so it's not -- to have the clause on that count in the Indictment at the end is not in parallel with the remainder of the paragraph, which is addressed to all of the charges. Just a period after "return a verdict of not guilty."

THE COURT: Is that OK with the government?

MS. ESTES: That is fine, your Honor.

MS. LESTER: And then on page 7, the first full paragraph, the third sentence: "Your function is to weigh the evidence." We would request that "and the lack of evidence be added," which I think the Court has added previously in the prior portion.

THE COURT: Sorry. Could you repeat where you were?

MS. LESTER: Yes. The first full paragraph on page 7. This is instruction G.

THE COURT: Yes.

MS. LESTER: The third sentence, "Your function is to weigh the evidence in the case," we would ask that "and the lack of evidence" be added after "weigh the evidence."

MS. ESTES: Your Honor, we don't think that's

necessary. I think if that is added, we would prefer "or the lack of evidence" instead of "and," because "and" implies that there is a lack of evidence.

MS. LESTER: Your Honor, if you look at the prior page, page 6, second full paragraph, the Court used the phrase in parentheses for a sentence that said, "if after a fair and impartial consideration of all the evidence (and the lack of evidence)," we would just ask that that same clause be inserted on page 7.

MS. ESTES: Your Honor, I think on this, too, we prefer, if we're going to keep including it, that it be "or" rather than "and."

THE COURT: I think it does make sense to say "or" in both places.

MR. WEDDLE: I have page 10.

MS. ESTES: Your Honor, there is one other thing on page 8 before we get to 10. Sorry.

On page 8, there is another place where it says "and the lack of evidence." It's in number 3, about the fifth line down. So we just ask that it says "or."

THE COURT: OK.

All right. Mr. Weddle, did you have the next one?

MR. WEDDLE: Yes, your Honor. On the first full paragraph on page 10, at the end of that paragraph, the instruction says, "The jury must be satisfied of the

defendant's guilt." I would request that that instead read, "The jury must be satisfied that the prosecution has proven the defendant's guilt beyond a reasonable doubt."

THE COURT: Any comments on that?

MS. ESTES: Your Honor, we don't think it is necessary but we also don't feel particularly strongly on that.

THE COURT: All right.

MR. WEDDLE: There are no summary charts that are not admitted in evidence?

THE COURT: Right. The summary charts were all admitted, right? Are there going to be any others in closing? Those are demonstratives but not summary charts, I guess, right?

MS. MERMELSTEIN: I think there will be things shown to the jury on slides. I don't know that they constitute summary charts, and I don't think we need an instruction on them since they are at sort of a different point in the trial.

THE COURT: So we take out K.

All right. Next.

MR. WEDDLE: On page 12, at the bottom, the Court is talking about bias. So the last full paragraph, it says, "Such a bias or relationship does not necessarily make the witness unworthy of belief." I just request the flip side of that and just add three words, "but it can."

THE COURT: OK. Any issues with that?

MS. ESTES: Your Honor, we don't think that is necessary. This is the standard language that's used. I think it is already clear that they can consider that.

THE COURT: OK. I'll consider that.

And 13?

MS. LESTER: Your Honor, in our letter dated March 4th, we had raised an objection to this instruction, "The defendant's testimony," but I believe yesterday on the record the government said that they did not object to our suggested change, which was to add a sentence at the end.

THE COURT: Yeah. I was going to change it along the following lines: "In a criminal case, the defendant cannot be required to testify, but if he chooses to testify, he is of course permitted to take the witness stand on his own behalf. In this case, Mr. Middendorf decided to testify. You should examine and evaluate his testimony just as you would the testimony of any witness with an interest in the outcome of this case. However, the burden of proof remains on the government at all times and the defendant is presumed innocent."

And then: "Mr. Wada did not testify in this case. Under our Constitution, the defendant has no obligation to testify," etc., etc., and then I repeat the burden as before. So, I think I have incorporated that.

MS. LESTER: Yes. Thank you, your Honor.

THE COURT: 14 we took out "and nonprosecution agreements" in the title of P, as in Paul.

MR. WEDDLE: I'm sorry, your Honor, just to back up.

You are still going to do the final paragraph of defendant's testimony, about not attaching any significance to the fact that Mr. Wada's --

THE COURT: Yes, that's all staying in. Yes.

14?

15?

16?

MR. WEDDLE: On 15, your Honor, I would -- I think this can be shorter.

THE COURT: Yes. We're working on shortening it, as discussed last night, and taking out, you know, defendants are arguing, the government's arguing, but just have more of a generic cooperating witness testimony.

MR. WEDDLE: OK. My comment may just overlap with what your Honor is already doing, then, but I would suggest delighting the paragraph that starts with Mr. Sweet and Mr. Whittle in the middle of page 15.

THE COURT: Yes.

MR. WEDDLE: And then the following paragraph: "However, it is also the case," I think we've also covered those two things.

THE COURT: Yes, I think we are essentially doing

that.

MS. ESTES: So, your Honor, we -- do you have any guidance as to what you intend to do on the cooperating witness charge?

THE COURT: It is really going to be the government's version as proposed.

MS. ESTES: OK.

THE COURT: Which is just a standard, shorter cooperating witness instruction.

MR. WEDDLE: I had a comment on page 16. I don't know if it is --

THE COURT: OK.

MR. WEDDLE: -- beside the point if you are doing a different instruction.

I think this may be obviated by just giving the government's request. But the pieces that I had an objection to, if they are not obviated, are the paragraph that says, "One final note in this regard" and it goes on. I think it is unnecessary and it could be cut, as it is not strictly accurate. I think it is permissible for the jury to consider why the government was making agreements with people that they were making agreements with.

THE COURT: So, the "One final note" paragraph is staying in.

MR. WEDDLE: I think that it is not accurate, or to

put it a different way, I think that there are fair arguments to be made that call upon the jury to have a concern about why the government made agreements with witnesses. They are permitted to do so, but I don't think that means that we can't comment on it. And I don't think that the jury should be instructed that they have to disregard any such comments.

MS. ESTES: Your Honor, I think it is relevant what the witness' understanding is about these agreements. But the fact that the government entered into these agreements is not something the jury should really be considering. So that's why we do believe this paragraph is appropriate.

THE COURT: I think that's right. It is really distinguishing why the government made the agreements with whether the witness was giving truthful testimony, which certainly can give the perspective of the witness and interest and motive they have.

MR. WEDDLE: I think the two things are intertwined, your Honor. I just wanted to be sure that we're not going to be charged out of the case. As I've said before in this case, what is unique about Mr. Sweet is not his bad conduct as a cooperator or the fact that he's a cooperator with a cooperation agreement but the fact that he lied repeatedly during the course of that cooperation to the government. He committed crimes. He failed to bring to the government's attention crimes of which he was aware. And the government

essentially just gave him a pass for all of that conduct. In fact, they entered into an additional cooperation agreement with him that gave him additional immunity for a mortgage fraud felony that he had lied about in his meetings with the government.

THE COURT: But I think it's accurate that the motivation and thinking of the government is not part of the jury's deliberation. You can certainly impeach him all you want with that and what they think of the witness is fair game, but I don't know why the government's thinking is relevant to anything.

MR. WEDDLE: We are entitled to comment on the government's --

THE COURT: Charging decision?

MR. WEDDLE: -- conduct of the investigation and their failure to pursue certain leads and their decision to bind themselves irrevocably to Brian Sweet and his lying. And we plan to do so, and I don't think we should be charged out of the case in making those arguments.

MS. ESTES: Your Honor, the government is not on trial here. I don't think -- I think the jury should be instructed that our decision on the agreements we made with witnesses, that's not relevant. It's relevant the witness' understanding -- the witness' understanding of the agreement. They can impeach all they want on the fact that, you know, the

witness said he committed more crimes and he still has his cooperation agreement in his understanding. They can do that. But the witness has not testified about what the government did. He doesn't know what the government is thinking. That is not something that is in evidence, and so I don't think this instruction is appropriate.

THE COURT: You do think the instruction is appropriate?

MS. ESTES: Sorry. We do think -- we don't think what Mr. Weddle is suggesting is appropriate.

THE COURT: Right. Anyway, I think it is a correct statement. I will think about it and double-check.

MR. WEDDLE: Your Honor, if I may just add to what I've already said, which so far has not convinced your Honor, but it seems to me to be a severe error, under Kyles v. Whitley, to give an instruction that essentially tells the jury not to consider the ways in which the government conducted its investigation that's resulted in the proof that's before the jury and the absence of proof that's before the jury. It's a mainstay of our argument, and we should be permitted to make it without the Court taking part of it away from us.

It's squarely permitted by Supreme Court precedent and Second Circuit precedent and the multiple agreements and multiple lies by Mr. Sweet and continuing criminal conduct in the face of all sorts of obligations, including his release on

bond, not to engage in criminal conduct, the fact than his bond has not been revoked and the fact that the government considering recalling him after he admitted a new mortgage fraud during his testimony.

THE COURT: So you think it is appropriate for the jury to consider that the government's agreement with that witness was improper? The government's, as opposed to the witness lying? I don't think that is part of the jury's task.

MR. WEDDLE: All we're asking for, your Honor, is that your Honor not say it is no concern of yours why the government made agreements with witnesses.

THE COURT: Right. That's why I'm asking --

MR. WEDDLE: That is what I am asking for.

I don't think we are going to say you need to ask yourself why did the government make an agreement with Brian Sweet. That's not the thrust of our argument. But the thrust of our argument very much will be they chose Brian Sweet. That's their case. That's their whole case.

THE COURT: That's fine. That's attacking the evidence. That's not attacking the government's decision.

MR. WEDDLE: And then we're going to go further and we're going to say that he lied. He lied to them over and over again and he committed crimes. He violated his agreement over and over and over again. And there is no chance that he's going to -- I mean, and now he says, well, he has to tell the

truth or his agreement is going to be ripped up. I think that the jury can find that to be utterly unworthy of belief because the government's conduct in this case toward Mr. Sweet has demonstrated over and over again that he is free to lie and they will continue to use him, because they need him, because they have nothing else.

MS. ESTES: Your Honor, I think Mr. Weddle's arguments still go to what Mr. Sweet's understanding of the agreement is. He can make those arguments. But it is still not relevant what the government's decision making was. And this is shown in the context of other instructions, like, for example, there is always a standard instruction on the government doesn't have to use particular law enforcement techniques. That's not required. That is a standard instruction. Like the government's decision to use particular law enforcement techniques, its decision to enter into agreements with certain people, the government's decision making is not on trial and is not relevant, and we think this instruction making that clear is appropriate.

THE COURT: Ms. Lester, is this something on this or something else?

MS. LESTER: It is having to do with the cooperating witness instruction but not on this particulars point. Do you want me to wait?

THE COURT: No. Go ahead.

MS. LESTER: OK. Your Honor, if the Court is inclined to accept the government's proposed instruction, we feel very strongly that there needs to be an addition to the first paragraph along the lines of what's in our proposed instruction. So, this is at request number 4, page 6 of Mr. Middendorf's proposed charge. We had suggested that the Court include an instruction that the jury should draw no conclusions or inferences of any kind about the guilt of the defendants from the fact that the prosecution witnesses have pled guilty to criminal charges. A witness' decision to plead guilty is a personal decision about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendants on trial here. That --

THE COURT: All right. That was in the old version.

MS. LESTER: Yes. That instruction is not in the government's proposed instruction. It is standard Sand, I believe, and we feel, especially here, where Mr. Middendorf testified --

MS. MERMELSTEIN: I'm sorry to interrupt, but we have no objection.

THE COURT: Yes. So you are talking about the language that starts with, "You are instructed that you are to draw"?

MS. LESTER: Correct. And ends with, "as evidence against or unfavorable to" --

THE COURT: Yes. That's fine. We will add that.

MS. LESTER: Thank you.

THE COURT: Mr. Weddle, I will consider the argument you are making, but it still seems to me that why the government made agreements with witnesses is on one side of the line, and your arguments about credibility and the lack of evidence and etc. are fair game, but I will think about it.

MR. WEDDLE: And it may be that your Honor's intent in using this language is to draw a distinction that we're not crossing that line and we're in agreement. I think that the language chosen has a risk of being misunderstood by the jury as a statement that our arguments are not proper arguments, or they don't fit into the instruction. So we're not -- I think -- your Honor has heard what our argument is going to be. If it is not contrary to this instruction, I would suggest that we just take it out because we're not going to be arguing for the thing that this instruction is addressing, and I think that it's susceptible in its current form of undermining the argument we intend to make.

I had one other point and this may -- I haven't had time, I'm sorry, to just read carefully the government's instruction, but on the draft that we have here, on the issue of -- the last paragraph, which may be coming out, it says, "As I've previously instructed you, the issue of credibility need not be decided in an all-or-nothing fashion." I think that the

law is that it may be --

THE COURT: Actually, I think we are taking that out.

MR. WEDDLE: Yes.

THE COURT: We are taking that out.

Let's see. Anything on 16?

17?

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19?

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MS. MERMELSTEIN: Your Honor, sorry, on 19.

So, in the second paragraph at the top of the page, you have, "I instruct you that you may not draw any inference, favorable or unfavorable, towards the government or the defendants from the fact that there may be people who have not been tried as defendants in this case." I think that that language makes it sound like there has been some decision not to charge certain people, as opposed to just a direction that there should be no speculation about why certain people aren't here.

THE COURT: Who may not be on trial here or --

MS. MERMELSTEIN: Yes. You shouldn't speculate about why any other person other than the defendants is not on trial here I think is what was in the government's initial request, so from the fact that any other person other than the defendants is not on trial here.

THE COURT: OK.

19?

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MR. WEDDLE: Yes, your Honor. Along the lines of the Kyles v. Whitley argument that I was making before, on page 20, the paragraph at the top, not the first full paragraph but the carryover paragraph, I would propose striking the last sentence of that paragraph: "Their absence should not affect your judgment in any way."

THE COURT: Any objection?

MS. MERMELSTEIN: Yeah. I think the statement is correct, and the fact that the jury shouldn't be speculating or changing their views based on who did or didn't testify in the trial, they should evaluate the evidence in the case on its on without speculating about things outside of it. So, I think it is right the way it is.

MR. WEDDLE: The absence of knowledge of the witnesses, your Honor, is something that we can fairly comment upon, and it could affect the jury's judgment. It is the absence of evidence.

MS. MERMELSTEIN: They can certainly argue about the absence of evidence, clearly. I think that the point is that they shouldn't be speculating about why a particular person didn't testify or what they would have said and the fact that a

particular person wasn't called to testify. Right? It would be improper to say, well, if the government's right about this, why didn't they call this other person, right, just as it would be improper for the government to make the same argument even in the absence of the no burden issue.

You can certainly argue there is no evidence of a particular issue or that the witnesses who did testify had nothing to say about a particular issue and there was just a complete lack of evidence in the case. What you can't do is say that there are particular witnesses who should have been called and that you should speculate or decide anything based on the fact that they weren't. And I think this language is correct here and in no way suggests that the defense can't argue there is an absence of evidence.

MR. WEDDLE: Your Honor, the remainder of the paragraph, which was not requested to be deleted, fairly and accurately instructs the jury on the law, that is, that they shouldn't speculate about what an absent person would testify. It is completely proper for them to consider and to have it affect their judgment, the fact that other witnesses are not present and the witnesses who are present are Brian Sweet, giving secondhand information.

THE COURT: Let me ask you. Kyles is a Brady case, right?

MR. WEDDLE: Yes, it's a Brady case because it is a

case that stands for the proposition that it is fair argument and exculpatory for the defense to argue that the government's investigation was -- the investigation itself had failures. So, other leads were not pursued, other investigative steps were not taken, and, therefore, you have the case that you have in front of you, or have the evidence that you have in front of you, and that the manner in which the investigation was conducted did not do what it should have done, to dispel reasonable doubt. So, it is an impeachment of the investigation argument, which I think is what -- that's what I am referring to when I spoke about Kyles and maybe I am getting it wrong. But I think that it is a fair argument to say that the investigation was conducted in a manner that did not dispel the reasonable alternative interpretations, which is I think another way of saying they did not address to the level of beyond a reasonable doubt the issues in the case.

THE COURT: Yeah. I think you make a fair point, that the sentence "Their absence should not affect your judgment in any way," I think it is meant to emphasize the prior sentences, but it could be read to mean the absence of evidence is somehow off limits, and it's not. So I think the paragraph before fully covers it so I am fine with taking that out.

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21?

MR. WEDDLE: I'm sorry, your Honor, on 20 still, under

"Particular Investigative Techniques not required," at the end of that paragraph I would request that it be rephrased to say, "The government has proven the defendants' guilt beyond a reasonable doubt" rather than the passive-voice formulation that exists now, "The defendants' guilt has been proven."

MS. ESTES: That is fine, your Honor, with us.

MR. WEDDLE: And then in the next paragraph, your Honor, it says in the first -- in the second sentence, "You must bear in mind that guilt is individual." I would just ask for the flip side, "that innocence or guilt is individual."

MS. ESTES: That is fine with us.

THE COURT: Innocence or guilt, or guilt or innocence?

MS. LESTER: Always innocence first.

In paragraph -- I'm sorry, the bottom of page 20 and top of 21, in instruction X, there is the phrase, "or her." Since there are no female defendants, I think it is less confusing to take that out.

THE COURT: We cut that, yes.

MS. LESTER: Then on 21, in substantive instruction A, "Meaning of Indictment," the second full paragraph, the last sentence, "What matters is the evidence," we would ask again that, "or lack of evidence that you've heard and saw on the trial."

THE COURT: OK.

21?

22?

MR. WEDDLE: Your Honor, on page 22, in describing the counts of the Indictment, this was the subject of a motion to dismiss by Mr. Wada. But Count Two does not actually say who is the target of the fraud, and that is exactly what your Honor's proposed instruction does as well. I think the way that the case has been tried and in fact the way that the government opened on the case was to say that Count Two is intended to charge a conspiracy to commit wire fraud against the PCAOB.

THE COURT: Do you want to put that in there just to make it clear?

MS. ESTES: That is fine, your Honor.

THE COURT: And then do we need to repeat that for three, four, and five, or do you think it is clear enough?

MR. WEDDLE: Yes, probably. It may be that we cover it -- let's see. Do we cover it in --

MS. LESTER: I think it is more clear in the substantive counts that the fraud is directed against the PCAOB.

THE COURT: OK.

MR. WEDDLE: On 23 and 24, your Honor gives a more robust instruction about that.

THE COURT: Yes, that's right. OK.

23?

24?

MS. LESTER: So now that we are on pages 24 and 25, we're getting into the wire fraud instructions which we have a set of more complicated objections to. I think that your Honor indicated yesterday that you were -- you agreed that the alternative instruction, the "either" language, was going to be changed.

THE COURT: Yes.

MS. LESTER: So I won't address that.

But I could either do it now, my more substantive arguments, or we could continue with the line editing, whatever the Court's pleasure is.

THE COURT: Well, I'm fine doing the high level stuff now. I gather this is what's in your letter?

MS. LESTER: Yes.

THE COURT: Which I think makes some powerful points. And if you want to reiterate anything, you are welcome to.

MS. LESTER: Well, I won't belabor it, your Honor, since I know you've read the submissions. But the government then put in a letter this morning citing O'Hagan and saying that we were mistaken in citing it for the proposition that we had. We don't think we are mistaken. O'Hagan is a securities fraud case. The securities fraud statute is entirely different from the wire fraud statute. As part of the crime of securities fraud, the information must be used, because the

object of the scheme is to use the information to trade and to make money. The wire fraud statute has no such requirement. It's focused on the fraud to obtain money or property.

The fundamental problem I think that we have with the wire fraud charge is that it seems to try to combine two separate types of conduct. The first is the pure embezzlement fraud that we've described in our letter, which is similar to Carpenter and Sampson, and grounded in common law embezzlement. That fraud is clearly charged. The government alleges that information was stolen in breach of a duty, and that there was an omission made in that the person who held the duty did not tell the PCAOB that they had stolen the information. That is squarely just like Carpenter.

The use that's associated with embezzlement is the -- under Sampson is the intent that the embezzler has to use it. That's when that crime is complete. It is not a separate use later on. All of the use that the government has described in the Indictment regarding the use of the information in connection with improving inspection results is actually conduct that if you read the Indictment closely is directed at the SEC. It is not really directed at the PCAOB. All of the overt acts in Count One describe conduct that relates to the PCAOB. It is all related to use of the information.

The separate use by Mr. Middendorf or other people, as alleged, at KPMG is not a crime in and of itself. There is no

fraudulent misrepresentation. There is no omission. The government has not alleged any duty on the part of Mr. Middendorf to tell anyone that he had this information. There is no fraud there. This is what Mr. Weddle was getting at yesterday. Use, even of stolen information by itself, is not a crime. There has to be some fraudulent act in connection with that. The government has not alleged that.

Now, as to the wire fraud conspiracy, you know, it's harder to break this down because then it is a conspiracy, it is an agreement, and we understand why that could be viewed differently and more broadly as a scheme. But as to the substantive counts, the "to wit" clause in this case just makes no sense. The use of information is not what is chargeable under the wire fraud statute. It has to be a scheme to deprive money or property. The information was taken. That is the wire fraud. It's not the separate use after the fact.

So that's really the core of our argument and what we've really been arguing since the beginning of the case.

THE COURT: I understand. But given where we, what is your ask? You are asking for something about when the embezzlement type of fraud is ended?

MS. LESTER: Yes. I think we need some language both in connection with the substantive offenses and the aiding and abetting charge that makes clear that a defendant has to understand and has to participate in the act of embezzlement

itself. He has to have more knowledge of it. And that's why this case is almost charged, the substantives, as if they are conspiracies, and we're saying that is improper. There has to be a participation on Mr. Middendorf's part in the act of embezzlement, which is the fraud, otherwise he is not participating in a fraud.

THE COURT: Do you want to add to that?

MR. WEDDLE: I have a couple of things to add, your Honor, and --

THE COURT: I mean, I want to hear from the government on this, because I think this is really tricky stuff, and all I've got is this one-and-a-half page letter today. So I went back to the government's opposition to the motion to dismiss and there is about a page and a half on this.

But what I was describing as the government's theory of this I think is more sophisticated than what the government has laid out. So, I want an answer to what the government's theory of wire fraud is. I don't have much trouble with fraud against the United States. We'll get to that when we do. But what do you want to add?

MR. WEDDLE: I think three things, your Honor.

First of all, I appreciate the letter that Mr. Middendorf's counsel sent in and we join in it. It prompted me to reread Carpenter last night after I got it, and I noticed that there are a couple of interesting things in

Carpenter --

THE COURT: I read Judge Stewart's District Court opinion as well.

MR. WEDDLE: Ah, see, you were up later than I was.

THE COURT: Yes. But anyway, go ahead.

MR. WEDDLE: So a couple of interesting things that I noticed about Carpenter, which I think directly tie into what I was saying yesterday. And I think that, as I said yesterday, I think that the defendants' arguments here are consistent, although we obviously have a different emphasis.

And what I argued yesterday is that the scheme has to be a scheme to embezzle and misuse, not just a scheme to embezzle and not just a scheme to misuse. Neither one works. And I think that Carpenter provides direct support for that, because Carpenter of course has two pieces to the opinion. The first piece is about what is property. OK? We skip over that piece.

The second piece is what is the fraud. And this also I was thinking about your Honor's comments yesterday at the end of the day, and I thought of an additional thing that I should have said. Your Honor said, in response to some of my comments, that you were going to cover, you know, the deception and the fraud, that's all in the specific intent to defraud part. And I think it's important to note that there are -- that fraud appears in two elements of wire fraud. It has to be

a scheme to defraud combined with the defendant's specific intent to defraud, and it needs to be both. You can't have a scheme to cross the street performed with a specific intent to defraud and make that a wire fraud because that's not an illegal scheme, crossing the street.

So I do think that there needs to be an illegal scheme, and this ties into everything I said yesterday about the variety of verbs that appear in the Indictment which do not by themselves, if they are not defined to include a fraud element to them or a fraud characteristic to them, they don't describe as the first element of wire fraud a scheme to defraud. They may describe, or they're susceptible of a reading that describes a scheme to cross the street, a scheme to do something that's OK, combined with specific intent to defraud, and I think the instruction needs to do both.

But in Carpenter, what I noticed is that in the second half of this, which is about what is the fraud here, there are a couple of places where the Court pointed out that the fraud was not just the taking of confidential information, but it was part of a scheme to share profits. So I don't have a copy for your Honor, but there is a paragraph --

THE COURT: Which case? Sorry.

MR. WEDDLE: This is in Carpenter, your Honor.

THE COURT: Right.

MR. WEDDLE: So Carpenter, at page 3 -- no, sorry,

page 27, at the end of page 27 of 484 U.S. Reporter, the sentence says: "The district Court found that Winans' undertaking of the Journal was not to reveal prepublication information about his column, a promise that became a sham when, in violation of his duty, he passed along to his co-conspirators confidential information belonging to the Journal."

And here is the very critical point. There is a comma there, there is not a period. If simple embezzlement of information were enough under the wire fraud statute, the Court could just put a period there. The Court didn't do that. The Court went on to say: "Pursuant to an ongoing scheme to share profits from trading in anticipation of the heard column's impact on the stock market." So, do you see in that sentence there, because the Court did not just put a period and say he had a promise not to take this confidential information that he was entrusted with and that promise became a sham. Period. Full stop. If that described a fraud, then they wouldn't need to keep going, but it did keep going and described the use, or, you know, there are lots of different ways to articulate this. And I talked yesterday about the Dirks case, D-i-r-k-s in the insider trading context, but it is a similar concept. And I think that both of these cases are in different contexts, but they're talking about what is a fraud.

And part of what makes it a fraud is the benefit, or

here in Carpenter, the ongoing scheme to share profits. That's what makes it a fraud. It is not simply the violation of the confidentiality agreement with the Wall Street Journal for the information that was entrusted to him.

And there is another example and this is a shorter sentence, but at the very end of the opinion -- not very end, second-to-last paragraph, the Court says: "Winans continued in the employ of the Journal, appropriating its confidential business information for his own use." Those three words, "for his own use," describe the other essential component --

THE COURT: Personal benefit.

MR. WEDDLE: Personal benefit, for his own use, not simply the taking or simply the violation of the workplace rule. Because otherwise the workplace rule -- if the workplace rule and the violation of the workplace rule or the violation of that agreement or duty were enough, that would collapse in on itself and preclude the Finnerty decision.

So, I said I had three things. Anyway, I have probably forgotten one.

So our request, you know, our specific request -- and it is always boring when somebody does this at a charging conference -- is to use the instruction that we propose. So I think that the instruction that we propose covers the requirement of embezzlement. It covers the fact that the scheme has to include the use or the benefit to the alleged

embezzler, and it covers the fact that theft is not fraud, theft is not embezzlement. And I think that, you know, those are all important points that should be part of the instruction.

And I think our instruction, although it is not a joint proposal, it does include in it, I believe, some language -- maybe not enough -- about the completion of an embezzlement.

THE COURT: OK. Let me hear from the government.

MS. ESTES: So, your Honor, I think there are sort of two competing issues here. I want to take up Ms. Lester's point first.

In that context, I think we agree with Mr. Weddle that the scheme is not just the embezzling. It also includes the use of the information, like that is what makes it a scheme to defraud. The scheme to defraud starts when Mr. Wada takes the information from the PCAOB, in violation of his duty of confidentiality, leaks it to KPMG, and it continues as KPMG uses that information.

THE COURT: But the only thing you have talked about in the instructions is the type of fraud that is embezzlement type fraud. So, how is it -- if the embezzlement is done by the time Mr. Middendorf gets the information, what kind of fraud applies to him?

MS. ESTES: So, your Honor, we do not believe the

embezzlement is -- Ms. Lester cites some cases in the context of money that suggests that when money is taken, the embezzlement is complete when the money is taken. Your Honor, we cited O'Hagan to you today because that is a case involving the taking of confidential information. And the difference there is that the taking is not complete merely when the confidential information taken. For example, when Mr. Sweet took that hard drive from the PCAOB with the information on there, at that point there was no embezzlement. He hadn't even shared it with anybody. He hadn't violated his duty. The embezzlement happens when they share it and when they use it against the PCAOB. This is information taken from the PCAOB and then they use that information. They don't tell the PCAOB that they're going to use that information on --

THE COURT: But what duty do they have to tell the PCAOB anything? Is it derivative of Mr. Wada's duty? Does it carry over like a tippee situation, or do you not need a duty?

MS. ESTES: Your Honor, they know that it has been disclosed to them in violation of a duty. I believe Mr. Middendorf testify testified to that yesterday, that he knew this was inside information from the PCAOB, and then they used that information in PCAOB inspections and they don't tell the PCAOB. I think we'd be in a completely different situation if they said, hey, PCAOB, we have this anonymous information, we're using it. But they deliberately, purposefully omit that.

They don't tell them.

THE COURT: But didn't you argue that Mr. Middendorf had a duty to the PCAOB?

MS. ESTES: Your Honor, we think it is derivative of Mr. Wada's duty. They know this is confidential information and they use it without telling the PCAOB.

THE COURT: And what's the fraud?

MS. ESTES: So the scheme --

THE COURT: It is still an embezzlement type of fraud?

MS. ESTES: Your Honor, I think it is broader than that. It is a scheme to defraud. It is an embezzlement type of fraud starting with Mr. Wada, embezzlement or misappropriation; I think they are very similar there. But the scheme -- the whole purpose of Mr. Wada leaking this information is so that KPMG can use it on inspections. If he just leaked it to, you know, his mother-in-law and she did nothing with the information, I don't know that there would be any fraud at all; he would just be leaking information for no purpose. But the whole point was to leak it to KPMG so they could put it to use.

THE COURT: So does that mean if the list from the PCAOB were left in a conference room and somebody from KPMG wandered in and picked it up and then they used it, would that be fraud? In other words, they didn't know about an underlying violation by someone in Mr. Wada's position, a breach of duty

by someone in that position.

MS. ESTES: Your Honor, I think we might be in a different -- I mean, those aren't the facts here. The facts here are they knew this came from a source inside the PCAOB, so I don't think it is necessary to go there.

I would just note, turning back to the O'Hagan case, this expressly came up there because the defendant had embezzled confidential information, not money, from his employer, and then he had used it to trade on securities --

THE COURT: Right. But he was the one with the duty. He was the one who breached his duty to his employer. Here, you have someone at KPMG who has no duty to the PCAOB unless you are going to argue that he does.

MS. ESTES: Right, your Honor. I guess the import of this case is that this case makes clear that the fraud only happens when the information is used. That's when the fraud happens, when the fiduciary gains the confidential information and then uses the information. In that case it is to purchase or sell securities. And in that case the Supreme Court expressly distinguishes the type of embezzlement fraud involving money that would be then complete when the money is taken from a fraud involving confidential information. The whole point of a fraud involving confidential information is it has to be put to use.

So here it's a scheme, it's not just -- you can't

isolate it incident by incident. And the scheme is Wada leaks the information so that KPMG will use it. It is one scheme to defraud. You can't parse it out piece by piece.

THE COURT: But isn't it possible that Wada -- arguably Wada and Sweet used the information when they shared it and at that point the embezzlement was complete? I mean, that's what Ms. Lester is arguing, I think.

MS. ESTES: The fraud is using the information in the context of inspection. It is like continuing to use it. If they had just shared it and KPMG hadn't acted on it, I don't know that we would be in that situation. But we have a situation where they acted on it. They authorized acting -- taking actions --

THE COURT: The reason -- I mean, if you look at the opposition to the motion to dismiss back in the day, May 2018, with respect to -- I am at the bottom of page 26 of the government's brief: "With respect to wire fraud schemes based on the embezzlement of confidential information, the crime is complete not when an insider obtains the relevant information but when he uses such information for personal gain or provides it to a third party." That suggests -- well, I'm not exactly sure what it suggests, but if he provides it to a third party, you're saying that the crime is complete?

MS. ESTES: Your Honor, I'm sorry. I did not brief the motion to dismiss and I haven't looked back at it.

We're saying that the crime is complete when they turn around and use it against the PCAOB. This is information taken from a victim, and then KPMG gets the information. They have the information they know was taken from the victim, and they turn around and use it against the victim and they don't tell the victim they're doing that. I think it seems completely artificial to take out the second half of what happened, when they use the information against the victim, they deliberately don't tell the victim that they're doing that, so that they can do better on an inspection result. That is the fraud.

THE COURT: But your proposed instruction also includes something on embezzlement and what embezzlement means, but nothing else. In other words, you don't -- you seem to suggest today that there is a broader definition of fraud or different types of fraud that do the work after Mr. Wada sends the information to Holder and Sweet, whatever, but the only thing you define in your instructions is embezzlement.

MS. ESTES: Your Honor, I think we define, more broadly, that there was a scheme to defraud. We're asking for an instruction on that. We're asking for an instruction on an intent to defraud. And they will have to find that with respect to Mr. Middendorf, he intended to defraud the PCAOB.

They can argue that, you know, all they want that he didn't intend to do that. But I think that by requiring the jury to be instructed that Mr. Middendorf had an intent to

defraud the PCAOB, we're satisfying all the elements of this charge. As I said, it is just completely artificial to cut off that they got information from the victim. They turn around and use it against the victim without telling the victim. That is part and parcel of this scheme. It all goes together. I mean, you can't isolate that out.

THE COURT: Ms. Lester.

MS. LESTER: Your Honor, a couple of things with respect to the government's argument.

First, the distinction of money or information is really a red herring. The only reason that O'Hagan is different is because, as I said at the outset, it is a securities fraud case. Where use is integral to the scheme, there can't be a scheme --

THE COURT: Well, this is -- I think the type of confidential information is pretty similar here. I mean, as I said yesterday, if this inspection list, that particular kind of information were given to anyone else, it would be irrelevant. It's only useful if it is used by an audit firm.

MS. LESTER: Correct. But it's useful to the person who embezzled it because he is using it for his own personal gain, as alleged here, for purposes of his employment or for gaining employment --

THE COURT: Right. But the only meaning to the personal gain, the only reason that has substance, is if it's

used and valuable in the hands of an audit firm.

MS. LESTER: Correct. But that has to do with the intent of the embezzler, not the intent of the user, who did not have any part in the taking of the information or the fraud.

And I would just say that the government cited, in its motion to dismiss opposition, the Czubinski case, which is I think a First Circuit case. That case involved information that defendant accessed -- had unauthorized access to an IRS database, and the First Circuit held that his intent to use it, even though he didn't use it, would have been enough to constitute embezzlement. So it doesn't require any use by a third party. It's clear that when the fraud is focused on embezzlement, it is about the embezzler's intent to use and his actual use, not a third party's.

The government mentioned for the very first time the idea of a derivative duty here. They have never alleged that, your Honor. In fact, we briefed prior to trial in our motion in limine on the other duties issue because we wanted to discuss out whether the government was going to make this argument at closing, and they said that they did not intend to argue that there were any other duties in place other than the duties owed by PCAOB employees. I don't think --

THE COURT: Well, that is not inconsistent with what they are now arguing, that any fraudulent conduct on the part

of KPMG personnel was derivative of that duty of a PCAOB person.

MS. LESTER: But, your Honor, she said -- Ms. Estes said that it was because Mr. Middendorf and the other defendants at KPMG didn't disclose to the PCAOB what they were doing; they never told them what they were doing. Even though they are using the word "derivative," but what they're really saying is that the defendants at KPMG owes some duty to the PCAOB. There is no such allegation in the government's Indictment. There is no such proof at trial that anyone at KPMG owed a duty to the PCAOB.

Again, all of the conduct that Ms. Estes is describing relating to the use of the information goes to the fraud against the SEC. That is what that conduct is relevant to. The manipulation -- the purported manipulation of the inspection results has to do with the fraud in Count One, not the deprivation of property as to the PCAOB.

I would also say, your Honor, she mentioned whether if the information -- the hypothetical that your Honor suggested, if the information was simply found in a conference room and not used, that would be a different case, because that is precisely what happens in 2015 where maybe not under the government's view of the facts, but information arrives in Mr. Middendorf's in box. It is never used. He has no part in seeking it out. Mr. Sweet has already stolen it from the

PCAOB, and yet that's charged as a substantive count.

THE COURT: Can I ask, should the charge only instruct on embezzlement and should it not instruct on the general fraudulent misrepresentation language that's in there? Is there any fraudulent misrepresentation issue?

MS. ESTES: Your Honor, I think it should say misappropriation, at least, as well, but other than that, I think it is fine.

THE COURT: When I talk about what the Indictment charges, I was going to put in all of those verbs, "misappropriating," "embezzling," "using," because they are not going to have the Indictment so they need to have the language from the Indictment.

MS. ESTES: Yes, your Honor. I do think "using" should be in there. And I think Mr. Weddle actually in his letter had a suggestion that, on page 2, that it should say, "In the context of a criminal scheme to defraud, the words 'obtain,' 'share' and 'use,'" and he defines them to make clear that "obtain," "share" and "use" have to mean their obtained, shared and use with the intent to defraud, and we would be fine with further definition of those terms to make clear when we say "use," it has to be used in connection with the intent to defraud.

THE COURT: Is this something defendants have argued for? I am not following what you are --

MS. ESTES: I'm sorry, your Honor. I was just -- on page 2 of Mr. Weddle's letter, he talks about the scheme, how it says: "The government alleges there was a scheme to misappropriate, embezzle, obtain, share, and use," and I think in the second paragraph, he asks for a further definition of "obtain," "share" and "use" just to make clear that that's with the intent to defraud. And we would be fine with --

THE COURT: Is there some language that someone has proposed? You are making all of these arguments without giving me specific language.

MS. ESTES: Sure.

THE COURT: You are OK with what Mr. Weddle proposes on that?

MS. ESTES: On page 2 of his letter, we are OK with those two paragraphs. We are not OK with his language on page 3. It is his March 4th, 2019.

THE COURT: So you are OK with the two paragraphs about further defining the other terms?

MS. ESTES: Yes, your Honor.

MR. WEDDLE: Your Honor, and just to follow up on what I said earlier. I think that this definitional issue needs to appear both in Count One -- in element one and in element two of wire fraud, because the formulation that Ms. Estes just quoted talks about intent to defraud, but it also has to be a characteristic of the fraud itself. So it is not just about

what's going on in someone's mind, it is that the fraud itself needs to be fraudulent.

And I think that based on this discussion, your Honor, I think that it simply invites confusion for the jury to have all these verbs if that's not the government's theory. And I think that the government's theory is a simple one that involves fewer verbs, and the theory is that there was a scheme to embezzle and misuse this information.

THE COURT: Well, do you want to change it to two words or something? I am only going to do it if everyone agrees; otherwise, I am going to say what the Indictment says.

MR. WEDDLE: Just to follow up on that. I think that misappropriation is susceptible to an interpretation either of embezzlement or of theft, both things. That is not a wire fraud predicate. So, I don't think misappropriation means anything different from embezzlement unless it is something that it shouldn't be in there; namely, it is not a wire fraud predicate of theft. So, I think we should be cutting these extra words down because I am not sure if the jury -- I'm not sure it is self-evident, given the fact that we have been talking for a while about this issue, what "fraudulently obtained" means, or what "fraudulently share" means. "Embezzlement" I think is a much more concrete thing. And, you know, "fraudulently misuse" is part of the scheme. They charged a scheme that is both of those things, and it goes back

to what I was saying about Carpenter before.

That's the scheme that they've charged. I think that Mr. Middendorf has said they have a failure of proof in proving any involvement by Mr. Middendorf at a point in time that would encompass that scheme, and from our part they have multiple failures of proof, including the fact that they haven't proven involvement or awareness by my client that would encompass the full scope of that scheme. Plus, they have the theft versus embezzlement issue.

THE COURT: So we talked yesterday about putting in the standard fraud language from Sand. Is it your position now that none of that should be in there and that this should just be embezzlement?

MS. LESTER: So, your Honor, we had suggested in our proposed charge some language about embezzlement. I think part of the difficulty with this is that the defendants have been struggling to understand exactly what the government's theory is, and so at times they have described it as an embezzlement theory. That's why we suggested that language. I think that if -- and I think overall that more fits with the facts of the case, so that the jury -- there is less potential for confusion on the jury's part if there is some instruction that touches on embezzlement.

But I think if the straightforward, say, Sand wire fraud charge is given, then it's clear from that I think that

the substantive wire fraud charges, at least as to Mr. Middendorf, are faulty, because there is no misrepresentation or omission and breach of a duty --

THE COURT: I think you need that language so you can argue that, so I am going to put in the standard Sand.

MS. LESTER: OK. Your Honor, with respect to the proposal about the additional clarification of words like "use," I think this is why it's necessary to have some, as we proposed in our proposed instruction on Count Two -- I'm sorry, second element of wire fraud -- this is our request number 17 on page 27 of our proposed request to charge -- some language about what it means to participate, again, for the wire -- the substantive wire fraud instructions, because there is no agreement in place that would link Mr. Middendorf to the first part of the conduct. There needs to be an instruction for the jury about someone who joins in conduct after the fact once the actual crime is committed and not be found guilty on a substantive charge.

The scheme -- again, this all goes back to the lack of clarity in the government's charging of this scheme on the substantive counts in particular, but it would be completely unfair if there were no explanation to the jury where they understood that the crime of embezzlement ends at a certain period of time.

THE COURT: So that's the same point as your

participation point?

MS. LESTER: Yes.

THE COURT: And this is -- OK. So this is in your request number 17?

MS. LESTER: Correct.

THE COURT: All right. I will take a look.

MR. WEDDLE: And, your Honor, our request number 17 overlaps somewhat with Mr. Middendorf's, but it also has the flip side of what I've been arguing. Theirs talks about the need for the jury to find participation in the embezzlement, and ours also talks about the need for the jury to find participation in the misuse.

(Continued on next page)

THE COURT: Right. What's next?

MR. WEDDLE: Your Honor, one more issue which I think is in Ms. Lester's or Mr. Middendorf's counsel's letter from March 4th is the need for some language from Mahaffy.

THE COURT: Yes, I am going to do that. I am going to put in a set of factors that the jury may consider.

MS. ESTES: Your Honor, one thing on the personal benefit point that Mr. Weddle has requested. We would object to that. The personal benefit issue really comes up in the context of securities cases here. I don't think there is a need to prove that Mr. Wada did this with the intent to use the information for his personal gain.

We have to prove he intended to defraud the PCAOB. But the personal benefit, that comes from case law on securities fraud that is completely irrelevant here. I think making clear that he has to have the intent to defraud is sufficient there, that we shouldn't add in language from case law that is completely irrelevant.

THE COURT: The personal benefit language is in which request?

MR. WEDDLE: It is in our request 17 in our requests to charge at page 8. I think we also quoted it in our letter of March 4th.

To respond briefly, I think Carpenter confirms this in the two quotations I read into the record today, and that is a

wire fraud case. This obviously has been more hotly contested and litigated in the insider trading context, I agree with that.

I think the issue that the insider trading cases are wrestling with in this area has to do with what it means to have a scheme to defraud. In this situation I think the insider trading cases are indistinguishable from our situation. That is not to say that I disagree with Ms. Lester's argument regarding O'Hagan. I think she is exactly right. O'Hagan is talking about something else which is specific to the securities context, that is, the use in connection with a security.

But the general principle that taking of confidential information is not alone enough to constitute a fraud, that is in Carpenter. It is also in Dirks and all of the case law after Dirks. Newman, Salomon, etc., are all talking about language that includes in rule 10b-5 the phrase "scheme to defraud."

THE COURT: What's next?

MS. LESTER: The next thing might be the willfulness charge, your Honor, at least on my part.

THE COURT: We are talking about Count One?

MS. LESTER: No. Page 29.

THE COURT: This is wire fraud.

MS. LESTER: Both parties have briefed this already,

your Honor, and I think you know what our positions are. For the additional reasons cited in our letter, though, we think it would be more fair at this point for the Court to give the Tagliaferri instruction because that is what the Court had indicated it was leaning towards. I appreciate you didn't say for sure at the outset of the case. We think it is not only more appropriate under the law but that for reasons of fairness it should be given.

MS. ESTES: Your Honor, on that point I would note that at the final pretrial conference your Honor indicated you were going to give an entirely different instruction that was more consistent with the government's requested instruction. I don't think just the fact that you mentioned offhand that you were leaning towards Tagliaferri should change anything. The briefing has been extensive on this, so there is no need to really say anything more. We request the instruction as it is in the charge.

MR. WEDDLE: I join in Ms. Lester's request. I wanted to note, your Honor, that this has been true throughout the case and true prior to the case, and that is why we had the extensive argument that we had at the final pretrial conference and the briefing on willfulness that has occurred throughout the case.

In the cross-examination of Mr. Middendorf there was a good example of why this is such a critical issue. That

cross-examination spent a substantial amount of time on EC9. I think the proof in the trial has shown that EC9, as Ms. Hannigan testified, that even in the context of workplace decision-making by the ethics office, they apply a rule of reason, and things that are technical or strictly speaking violations of EC9 are not even the subject of workplace discipline based on that rule of reason.

Here we had 15 or 20 minutes of cross-examination of Mr. Middendorf about the strictures of EC9, which just invites the jury to confuse some kind of rule violation or ethical lapse or lapse of integrity with the wrongfulness that constitutes a crime. Those are two very different things. To just say that the government needs to prove the defendants intended to act wrongfully doesn't come close to distinguishing those issues for the jury.

THE COURT: What else?

MS. LESTER: On page 30, your Honor, with respect to the wire communications, there are no international wires alleged, so that phrase on page 30, instruction H, the first sentence, could be removed.

THE COURT: Does everybody agree we can take out international?

MS. ESTES: Yes, your Honor.

MS. LESTER: I don't think that the interstate communication is that much at issue here, but the example that

your Honor gives in that first paragraph as, for example, a telephone call or email between New York and New Jersey, we would suggest that no example be given. There was testimony by Mr. Koch from KPMG that the servers are located in New Jersey. It points the jury to specific evidence. We think it is clear what the jury has to find. We would ask that the sentence end after --

THE COURT: Sorry to interrupt. How about "between two states"?

MS. LESTER: Yes, that's what we would suggest.

THE COURT: I want to be clear. I think "interstate" is understandable to most of us, but there is a whole range of education level and even English-speaking level. I want you to bear that in mind in your summations as well.

MS. LESTER: We have no problem with that. We just didn't want the specific example.

THE COURT: Fair enough. I'll make it "between two states."

MR. WEDDLE: Your Honor, I'm sorry to take a step backward, but I wanted to emphasize with respect to transgressing ethical standards and workplace rules, in your Honor's initial formulation that concept is only addressed in an aside set off by dashes. I think that is such an important concept that it deserves its own paragraph.

MS. MERMELSTEIN: What page?

THE COURT: Page 30, the last paragraph?

MR. WEDDLE: Yes, page 30 there is a phrase set off with dashes. That is the only place in the draft that addresses workplace rules and ethical standards, and I think that is a critical distinction.

MS. ESTES: Your Honor, if Mr. Weddle wants more instruction on that, there should also be instruction that if there is an intent to deceive, violating workplace standards can be a fraud. Insider trading is against a lot of workplace standards and it is also a crime. If this is set out in a separate paragraph, it need to make the point that it is also true that some violations of workplace rules are frauds.

MR. WEDDLE: The paragraph we submitted, your Honor, I think covers both sides of the issue.

THE COURT: I'll take a look at that.

MR. WEDDLE: On page 31, your Honor, at the tail end of the wire transmission, which is completely standard, in a few places in this instruction your Honor talks about variance of dates. I think that is not applicable to this particular indictment because the indictment, as we talked about yesterday, charges the wire fraud as a one-year period. If there were a variance broader than that, it would probably be a prejudicial variance. The language or the instruction about it doesn't have to be an exact date is not really applicable to this indictment with respect to wire fraud.

THE COURT: You think it should come out entirely?

MR. WEDDLE: Just to leave it, yes, your Honor.

MS. MERMELSTEIN: It definitely needs to remain, your Honor. First of all, the language here is not talking about a variance from the general terms of the scope of the conspiracy in time. It is talking about a variance from a particular time, saying you can find a particular wire but it is okay if the exact time of the wire is off. That is of course exactly right. In other words, they can agree that the wire that was sent in furtherance of the scheme to defraud was a particular email even if the government got the time slightly wrong about the time the email was sent.

I think this case is no different than every other case in that there needs to be the general language that the time periods have to be approximately correct but need not be specifically correct. I don't really understand the argument that because of the way it is charged, it is not necessary here. I think it is necessary. I have literally never, ever seen a case where it is not included.

MR. WEDDLE: In some indictments, as your Honor knows, there is a chart of specific wire transmissions charged because a specific wire transmission is an element of wire fraud.

THE COURT: Actually, I already took out that paragraph on 31. I can't remember why, but I replaced it "The jury must unanimously agree that at least one such wire

communication in furtherance of scheme to defraud was proven by the government beyond a reasonable doubt."

MS. MERMELSTEIN: That sounds fine, your Honor.

THE COURT: But you disagree with the general instruction on variance?

MS. MERMELSTEIN: The general instruction on variance is totally appropriate and necessary. It doesn't have to be right here, and your Honor's new language is fine with the government. I was moving on to page 33.

MS. LESTER: I have something on 31 with respect to aiding and abetting, your Honor. This is a follow-up to the comment I was making a moment ago about the crime of embezzlement and when it is complete. We would ask the Court to consider our proposed instruction, the final paragraph on aiding and abetting, which is request number 19 at page 37 of our proposed requests to charge, which instructs the jury that a defendant cannot aid and abet a crime that has not been completed.

THE COURT: You said the last paragraph?

MS. LESTER: Yes, the final paragraph. It's the carryover from page 37 to 38 of our instruction.

THE COURT: Okay. 32?

MS. MERMELSTEIN: 33, your Honor. This is a minor point, but in a number of places the draft charge summarizes the indictment as charging who was in the conspiracy. It says,

looking in paragraph J, in the second sentence of the first paragraph, "Count Two of the indictment charges that defendants Middendorf and Wada conspired with Whittle, Britt, Holder, and others known and unknown."

Given the testimony before the jury about who was in the conspiracy, it is confusing that Mr. Sweet is not here. He of course was charged in a separate instrument and this is the language of the indictment. In particular, since they are not getting the indictment, we should just say it charges that defendants David Middendorf and Jeffrey Wada conspired and agreed with others, and not get into who it is because it think it raises more questions than it answers.

THE COURT: Any objection to that?

MS. LESTER: No. That's fine with us.

THE COURT: Anything else on 33-34?

MR. WEDDLE: Your Honor, I had line edits on 34, on the object of the conspiracy. I would just say, "The object of the conspiracy is the illegal goal that the co-conspirators agreed to achieve."

THE COURT: The illegal goal?

MR. WEDDLE: Just to avoid a circularity problem. Conspiracy is conspiracy and then what is the object of the conspiracy.

THE COURT: How about "seek to achieve"?

MR. WEDDLE: That's fine.

THE COURT: Is "hope" enough?

MR. WEDDLE: I think "hope" is too weak to be conspiratorial.

THE COURT: Any objection to "goal" as opposed to "agreement"? I think that makes more sense.

MS. LESTER: That's fine with us, your Honor. We had discussed yesterday about reversing these two clauses.

THE COURT: Yes. I actually was going to say, "The object of the conspiracy charged in Count Two is to commit wire fraud," because that is what the indictment actually said.

MS. ESTES: That's fine with us.

THE COURT: 34? 35?

MS. LESTER: Your Honor, this is minor, but the second full paragraph on page 35 uses the term "confederates." We would ask that that be stricken and that it just say "were also co-conspirators of the defendants on trial."

THE COURT: That makes sense.

35? 36? 37?

MR. WEDDLE: On 37, your Honor, I think there should be an instruction that is the flip side. In the first paragraph of page 37, the last sentence is "The defendant you are considering need not have been fully informed as to all the details or the scope of the conspiracy in order to justify an inference of knowledge on his part." The flip side of that is "The defendant you are considering must, however, have agreed

to join the conspiracy charged, not a different conspiracy or a smaller conspiracy." I think this relates to the argument that I made before about the scheme that's been charged and the need for a multiple conspiracies charge.

THE COURT: To orient me, where are you exactly?

MR. WEDDLE: Page 37, first paragraph. At the end there is an instruction that says, "Moreover, the defendant you are considering need not have been fully informed as to all the details or the scope of the conspiracy in order to justify an inference of knowledge on his part."

I don't think we need a long sentence there, but we could just say, "However, the government is required to prove that the defendant you are considering participated in the conspiracy charged with knowledge of the general scope of the agreement he was joining."

MS. MERMELSTEIN: Your Honor, I think the addition of that language is confusing. The notion that the defendant has to join the conspiracy, this conspiracy, knowingly is made clear in many parts of the charge. As Mr. Weddle himself has just acknowledged in referencing his multiple conspiracies request, what is happening here is an effort to backdoor the multiple conspiracies idea into a charge notwithstanding that there is no basis for a multiple conspiracies charge here, as I think your Honor has already indicated. I think this charge is appropriate as it is and should not be changed in the way that

is suggested.

THE COURT: I'll take a look at that.

MR. WEDDLE: Your Honor, at the very end of that instruction, so at the top of page 38, we have some extra standard languages that is not applicable here. There is only one object of the conspiracy. I don't think we should say "some of the purposes or objectives of the conspiracy." There is one object. I think the definition that the law is drawing and that your Honor's instruction is trying to draw is the difference between knowing each and every detail of a conspiratorial agreement versus knowing the essential nature of the conspiracy. The second thing is required.

THE COURT: You would change "with knowledge of at least some of the purposes or objectives" to "with knowledge of its purpose or objective"?

MR. WEDDLE: Yes. And I would add in front of the word "intention" "with the specific intention of aiding in the accomplishment of" -- I think that could be singularized, if that is a word, "that unlawful act." And there are probably also line edits to the last sentence.

THE COURT: All right.

MS. MERMELSTEIN: Your Honor, in paragraph O on the same page, I think language here is confusing and potentially not correct. You describe the time frame of the conspiracy alleged and then say the government must prove beyond a

reasonable doubt that the conspiracy was formed and existed from roughly April 2015 to February 2017. I'm not sure that is exactly true.

In other words, if the conspiracy had in fact existed much longer in either direction, the government couldn't prove that conduct had only taken place in those time periods given what it charged, but it is not really necessary that it started when the government said it started exactly.

What would be clearer is to move the description of the time frame up front, when you first say what the conspiracy is. In paragraph J, when you describe the conspiracy, you say Count Two of the indictment charges that there was this conspiracy. What I would do is say, "Count Two of the indictment charges that defendants David Middendorf and Jeffrey Wada conspired and agreed with others to commit wire fraud between about April 2015 and February 2017," and then leave the variance and date and time issue to -- there is, if I recall correctly, a stand-alone variance in date and time at the end, and I think that's fine.

THE COURT: You would take out O?

MS. MERMELSTEIN: I would take out O and move the date range up to the description of the conspiracy, that's right. So leave in W. We will have to change W because they are not getting the indictment, but giving the general instruction that variance in dates and times is okay.

THE COURT: Any comments on that?

Now we are on Count One.

MR. WEDDLE: Your Honor, before we get into Count One, may I propose a brief break?

THE COURT: I was just going to say that. We'll take a quick break.

(Recess).

THE COURT: Page 38, Count One.

MR. WEDDLE: Page 39. Your Honor, my suggestion is that we shorten the description of the Count One charge. This is in the second full paragraph on page 39 where you are describing what the indictment charges. I think it should say, "The indictment charges the defendants and their alleged co-conspirators with employing deceit, craft, trickery, and dishonest means to impede, impair, defeat, and obstruct the lawful functions of the SEC."

THE COURT: That makes sense to me. Does anybody have any problem with that.

MS. ESTES: I think that's fine, your Honor.

THE COURT: Let me make sure I have it.

MR. WEDDLE: It's just cutting from the word "misappropriate" to the word "thereby."

THE COURT: First of all, we are taking out the names, right?

MS. ESTES: Yes, your Honor.

THE COURT: So we are keeping "In April 2015 to February 2017 the defendants and their co-conspirators"?

MS. MERMELSTEIN: "The defendants along with other individuals conspired," either way.

MR. WEDDLE: The comment that I made started after that.

THE COURT: Your comment started with --

MR. WEDDLE: The second sentence.

THE COURT: "The indictment charges"?

MR. WEDDLE: To cut the language starting with the word "misappropriate" and ending with the word "thereby." Then we would just have to change the endings of the verbs.

THE COURT: Got it. Anything else on 39? 40?

The big issue on Count One is defendants have argued that the functions of the SEC that are pertinent to the impeding, impairing, etc., cannot include the function of overseeing the PCAOB. I want to hear from the government on that question.

MS. MERMELSTEIN: Your Honor, I think it is true that it would not be sufficient if the government's theory was that essentially anything that impedes the function of the PCAOB definitionally impedes the function of the SEC because the SEC oversees the PCAOB. That's Tanner, and it is not enough, I think that's true. But no one is arguing that.

It is clear from the testimony that the SEC's own

functions were impeded separate and apart from its oversight. The oversight is relevant, though. To the extent that it is impeded because it normally relies on things from the PCAOB and has a relationship with the PCAOB and this impeded its ability to rely on the PCAOB's work product, that is proper. I'm not sure there is actually that much disagreement on the law here, but we think the proposed instruction makes that clear and doesn't need anything else.

THE COURT: What exactly do you want, Ms. Lester, in the instruction that's different?

MS. LESTER: I think your Honor recognizes our point in the way you articulated it.

THE COURT: I didn't say I agreed with it. I said I wanted to hear from the government on it.

MS. LESTER: I'm sorry. I didn't mean to imply that you had.

THE COURT: I actually don't read Tanner that way at all. I think you are overreading Tanner, frankly, but the Government agrees. I don't see why the SEC's function of overseeing the PCAOB is not within the functions, and that as long as you have a purpose to obstruct it, it can't be one of them. I don't think Tanner says that at all. What language do you want?

MS. LESTER: We would like language as we suggested in our request number 24. This is on page 51 of our proposed

requests.

THE COURT: You said 24?

MS. LESTER: It is request number 24. The actual language I would suggest is at page 53, which begins with the sentence at the very top of page 53. "In order to agree to defraud the SEC, the defendants must have agreed that fraud, deceit, or other dishonest means would be targeted at the SEC. Fraudulent conduct directed solely at a third party, here the PCAOB, is not a fraud against the United States."

Your Honor has some of the suggested paragraph in your charge. But in particular because all the overt acts relate to conduct that references the PCAOB, we think it has to be clear, closer to the description of the overt acts, that the actual agreement has to be targeted against the SEC.

We would suggest inserting that language on page 43 after the carryover paragraph or perhaps at the beginning of the next paragraph. And we do think that the indictment's description of lawful functions is confusing and leads to this convergence problem that we talked about where the jury could perceive that the only function to which the inspection reports relate is the SEC's oversight function. We believe under Tanner that is not sufficient.

The government has said in briefing that it would not argue that it was the oversight standing alone that was impeded. We think there has to be clear language in the charge

itself that directs the jury to understand that the defendants must have in their mind the SEC and an actual function of the SEC beyond something directly related to its oversight of the PCAOB

MS. MERMELSTEIN: May I be heard, your Honor?

THE COURT: Yes.

MS. MERMELSTEIN: Your Honor's charge already makes this clear, and I think the language Ms. Lester suggests is legally incorrect and enormously misleading to the jury. It is not necessary that the dishonest means be targeted to the SEC. That suggests that if all you did was interfere with the inspections process of the PCAOB, then you definitionally can't have intended to obstruct a function of the SEC. That is clearly not true. It is very clear that you can interfere with the function of a U.S. agency by interfering through an intermediary essentially.

This suggests the opposite. I think this language is wrong and is going to suggest to the jury that unless there was some fraudulent direct communication to the SEC by the defendants, they can't be convicted. That is, of course, not at all correct. I don't think the defendants even think that. I think that is misleading, and I think the way it is is fine. This in the government's view would be enormously problematic to add.

MS. LESTER: Your Honor, without any definition of the

lawful functions, which we discussed the other day -- we have asked the government to explain what lawful functions they are relying on. They haven't specified.

The charge as currently drafted on page 43, the second paragraph, says that the conspiracy means that the defendants are accused of conspiring to impede, and then the very last phrase, "the lawful functions of the SEC to carry out its regulatory and enforcement functions." That makes no sense and is completely circular and gives the jury no instruction as to what they should be focused on.

In a case where the government's proof has demonstrated some amount of overlap between the SEC and the PCAOB's role in terms of regulating the audit firms directly, there has to be clarity given to the jury about what function they are supposed to be focused on and that that function has to be a specific aim of the defendants.

Without describing in more detail what exactly they are supposed to be looking for, the jury is going to be left having no idea of what the defendants could have possibly intended to impede. They are going to be relying on a general sense that the conduct that is alleged in the overt acts, that is, all the conduct that relates to the PCAOB, could in fact apply to fraud against the SEC.

That can't be the case unless the jury separately finds that the SEC was at least one of the targets of the

scheme. That's what we are trying to express. I think the Court understands our point of view. It is just that the charge as written in places does not make that clear.

THE COURT: I'll take a look at that. I do think that last sentence you mentioned on 43, first full paragraph, the lawful functions of the SEC to carry out its regulatory and enforcement functions, doesn't make sense. I think it has to be to impair, impede, etc., a lawful function of the SEC.

MR. WEDDLE: To add to what Ms. Lester said -- and I take your Honor's comment about disagreeing with the defense's position about the scope of Tanner -- we did join in Mr. Middendorf's request which is in the second paragraph on page 53 of those requests to charge. It is two sentences that say "In this regard, I instruct you that the SEC's oversight of the PCAOB cannot transform a fraud on PCAOB into a fraud on the SEC." Then there is another sentence. That is directly the Tanner language, those two sentences.

THE COURT: Is this the same language from request 24, "in order to have agreed to defraud"?

MR. WEDDLE: It is. Maybe I'm being redundant, your Honor. Ms. Lester has pointed directly to the in order to have agreed to defraud language. I think in order to fairly encompass Tanner, what we need are the concepts in both paragraphs on page 53 of Mr. Middendorf's requests to charge, not just the first paragraph, which is the one specifically Ms.

Lester adverted to.

I'm not saying she was trying to omit the second paragraph. I just wanted to be clear for the record that I think there should be a sentence in the charge saying that the general oversight responsibility of the SEC over the PCAOB does not transform any fraud on the PCAOB into a fraud on the SEC.

THE COURT: I'll take a look at that.

MR. WEDDLE: Your Honor, since we have arrived at page 43, I have the same comment in terms of deleting some additional language in the carryover sentence from page 42 to 43. I would once again say "the defendants willfully and knowingly, using deceit, draft craft, trickery, and dishonest means, impeded, impaired, defeated, and obstructed the lawful functions of the SEC."

THE COURT: Bottom of 42?

MR. WEDDLE: Bottom of 42 carrying over to 43.

THE COURT: You would delete starting where?

MR. WEDDLE: Starting with the words "by misappropriating, embezzling."

THE COURT: Okay. And pick up . . .

MR. WEDDLE: We have "trickery and dishonest means defrauded the United States or an agency thereof, the SEC." I think we could keep the I-N-G endings of the words, and say "by impeding, impairing, defeating, and obstructing the lawful functions of the SEC."

THE COURT: You take from out "by misappropriating" until where?

MR. WEDDLE: Until the word "thereby," which is at the second-to-last line of the carryover paragraph on page 43.

THE COURT: Any objection?

MS. ESTES: No, your Honor.

MS. LESTER: I don't object. I agree with the suggestion. To track the language of the statute, it should be exactly as we edited it before, to be "to impede, impair, defeat, and obstruct the lawful function of the SEC."

THE COURT: That makes sense. Anything else on 43?

MS. ESTES: No, your Honor. But we do have something at the top of page 44. On that page, at the end of the last full paragraph, the last sentence there seems to imply that there can be only one target of the conspiracy.

THE COURT: Where are you?

MS. ESTES: Top of page 44, the last paragraph, where it says, "Therefore, if you conclude that the government has proven that the only target of the conspiracy was the PCAOB." We would ask the Court to include another sentence in there or something to make it clear that there can be two targets of a conspiracy. I don't think that is necessarily clear in these instructions. Of course, on this count we agree they have to find the ultimate target was the SEC. But I think there needs to be some language in here to make clear that it could be a

conspiracy that targeted both.

MS. LESTER: Your Honor, we think this sentence is important. This is the type of sentence that I was suggesting should be added perhaps further up in the charge. Perhaps if the Court shortens the charge a little bit and puts that language closer to the language that already exists in the charge about how the intent to defraud the SEC may be incidental to another primary motivation or purpose, which is on the prior page, that will be clear to the jury and there is no need to repeat the instruction that there can be more than one target or purpose.

MS. ESTES: Your Honor, this could also be resolved by striking the last sentence of that paragraph, "Therefore if you conclude." The sentence before that makes clear that the ultimate target of the conspiracy must be the SEC. It is that one sentence that has this implication that there can only be one target. If that sentence is stricken, then it would be fine with us.

THE COURT: You're talking about the "Therefore, if you conclude" sentence?

MS. ESTES: Yes, your Honor.

THE COURT: Defendants want it in, right?

MS. LESTER: Yes, we do. It doesn't have to be placed there exactly, but we need that concept to be in for the reasons I was stating earlier, which is that there is a lot of

overlap in the proof between the oversight responsibilities of the PCAOB and the SEC. I think it has to be clear.

And because of the overt acts that the jury is going to be asked to assess, there does have to be some sentence that says this outright. The jury has to be told that finding that the PCAOB was the sole target of the conspiracy is not enough. I don't think that is directing them to assess the evidence. It is just making clear what the law is.

THE COURT: I'll take another look at that.

By the way, at the bottom of 43, the very last sentence, I just noticed this, I'm not sure it makes sense. "But the government must prove that the U.S. or one of its agencies or departments was the ultimate target of the conspiracy and that the defendants intended to defraud."

MS. LESTER: It either needs another clause at the end or you could just take out comma "and."

THE COURT: We can take out comma "and." I guess that's verbatim from Copeland. I still think it makes more sense to take that last part out.

Anything else on 44-45?

MR. WEDDLE: Just a small change. At the end of 44, your Honor, the last sentence on 44, I think we should take out the words "tends to" and change it to "only an agreement to engage in conduct that impedes the SEC and also involves fraudulent." We could take out "does" and just make it

"constitutes."

THE COURT: You would say "only an agreement that impedes the SEC"?

MR. WEDDLE: Yes.

THE COURT: "to engage in conduct that impedes," right?

MR. WEDDLE: Yes.

THE COURT: What was the next one?

MR. WEDDLE: Towards the end of the line it says "does constitute." I think we could just make it "constitutes."

THE COURT: Okay. "Tends" is also verbatim from Copeland. But you guys write better than the Second Circuit sometimes.

MS. LESTER: I think we are up to conscious avoidance, your Honor, on page 45. The charge says if applicable. We don't think that it is applicable in this case. We don't think that there is a factual basis for it. There was no evidence at the trial of the fact that Mr. Middendorf consciously avoided knowing, so we don't think it applies here.

MR. WEDDLE: We agree. In addition to the fact that there is no predicate for it, your Honor, I think that the language here can create a great deal of confusion where all we have are single-object conspiracies. Some of this language comes from situations where, for example, someone joins a drug distribution conspiracy and they never opened a package so they

don't know if it is cocaine or heroin. But this is nothing like that.

As we were just talking about with respect to Count One, the government has to prove that the defendants specifically targeted the SEC. All this conscious avoidance language makes it seem as if they can not know anything about the SEC or be said to be avoiding knowledge about how the SEC uses inspection reports. I think it creates a lot of issues.

MS. ESTES: Your Honor, we think this instruction is appropriate, especially in light of Mr. Middendorf's testimony yesterday. First, with respect to March 2016, he essentially testified that he did everything in connection with the crime but his testimony was he didn't know it was wrong, he thought it was a gray area. We think there is an argument that he consciously avoided grappling with the fact that it was wrong when every other person who testified in this case said they knew that using confidential information from the PCAOB was wrong.

So we think the March 2016 conduct merits a conscious avoidance instruction. We also think it is merited by the January 2017 information. The testimony was that he got that information after in March 2016 he got confidential information from the PCAOB. In January he gets information again, it comes from Tom Whittle and Brian Sweet, the same people involved in March 2016, and he doesn't do what he needs to do to find out

that it is confidential information, was his testimony.

He didn't ask about it. He didn't ask where it came from. He just went with it. In doing that, particularly in light of the fact that the year before he knew it was confidential, we would submit he consciously avoided in January 2017 finding out that this was confidential PCAOB information. We think the instruction is appropriate.

THE COURT: I do think it is applicable based on the testimony.

MS. LESTER: Your Honor, I think the government is mistaken. Conscious avoidance is triggered by a fact that the defendant purposely avoids knowing. Mr. Middendorf said that he understood that the information on the operative dates, that is, in March and February, March of 2016-February of 2017, that he knew that the information came from the PCAOB. I don't think that the factual predicate has been laid.

There was no implication from Mr. Middendorf's testimony that he did not ask additional questions. He just had a different understanding of the information in January. He didn't deny that on the occasions where it was clear to him that there was in fact confidential information, that he understood that's what it was.

Even if the government were correct that it could apply in January 2017, to give this instruction as an overlay to all conduct charged in the indictment when they only really

have any basis to raise it with respect to that isolated period of time, which is then completed a month later when he does know and acknowledged on the stand that it was confidential information, creates a completely misleading impression to the jury that Mr. Middendorf was avoiding knowing facts when that's not what was the case, what was actually proven at trial at all.

THE COURT: I thought there was some testimony about not following up with, for example, Mr. Sweet about exactly the path of the information.

MS. LESTER: He also acknowledged, for example, in 2016 that he knew it was confidential PCAOB information. It doesn't matter if he didn't follow up if he had the knowledge. He is not saying he didn't.

MR. WEDDLE: Your Honor, to address this, Ms. Estes made two arguments relating to Mr. Middendorf's testimony. The first one related to 2016. That argument is error because conscious avoidance is permissible under certain circumstances. The example that I mentioned before, which is which illegal drug is involved in a drug conspiracy, that is the knowledge element of the conspiracy.

The wrongfulness of conduct is a subset of the intention mens rea of the conspiracy. To join a conspiracy, the defendant has to have knowledge of the essential nature of the conspiratorial agreement. That part can be consciously

avoided.

The defendant also has to have an intention or a purpose to help the conspiracy succeed. That part cannot be consciously avoided. But it has within it a subpiece, which is knowledge or awareness of the wrongfulness of the conduct and intention to do it anyway.

The argument Ms. Estes just made had to do with Mr. Middendorf purportedly avoiding consciously that he was aware of the conduct. The argument was that he avoided learning that it was wrongful. That is a piece of the intentional mens rea element.

THE COURT: You're saying that the conscious avoidance does not apply to that piece?

MR. WEDDLE: Exactly. I think I can find a case cite for that proposition. The intention required to join a conspiracy cannot be supported by a conscious avoidance argument.

THE COURT: I think that may be right, because I have defined willfully to be wrongful purpose. I don't think you could use conscious avoidance to substitute for that. I take your point.

It seems to me you all are trying to limit the government from arguing that the embezzlement carried over into the conduct of Mr. Middendorf. If that's true, shouldn't the government be able to argue that the defendant consciously

avoided learning facts related to the underlying breach and misappropriation and embezzlement?

MS. LESTER: Your Honor, looking back at Mr. Middendorf's testimony, it was clear that he admitted that he knew that the information was from the PCAOB. He didn't know exactly how it had been transmitted to Brian Sweet, but that doesn't matter.

If the proof showed that he had somehow encouraged Brian Sweet to obtain the information similar to what Mr. Whittle testified during his direct examination, that there was an implicit understanding that Brian Sweet would obtain that information, then it doesn't matter whether Mr. Middendorf never inquired further as to the exact source, that is, the person who provided Mr. Sweet with the information. He did not deny that he understood that it came from the PCAOB.

I just don't think it is applicable here. I completely agree with Mr. Weddle's arguments about the knowledge versus intent. But also in terms of specific facts, there is no specific fact that Mr. Middendorf turned away from or deliberately avoided knowing that would change the substance of his testimony because he said he knew it came from the PCAOB.

MR. WEDDLE: I agree with Ms. Lester that the statements made during the testimony of Mr. Middendorf eliminate any predicate for conscious avoidance, but I would

add that this general conscious avoidance instruction is deeply prejudicial to Mr. Wada.

THE COURT: Half the appeals in the Second Circuit are all about the conscious avoidance instruction. It is always upheld, but it is always a mushy determination of whether it applies.

MR. WEDDLE: I just don't think there is a predicate here. There certainly is no predicate with respect to Mr. Wada. I think anyone listening to this instruction could get completely confused about the targeting of the SEC requirement in Count One, for example.

MS. ESTES: Your Honor, with respect to both defendants, they have made this argument that they couldn't possibly know a duty was breached because EC9 is this broad thing and people were sharing draft agendas. The conscious avoidance instruction is also relevant to that. To the extent that they are going to argue that they didn't have this knowledge, we would be able to argue that they consciously avoided.

THE COURT: Doesn't that go to the wrongful purpose issue of conscious avoidance as opposed to something as to which knowledge is required?

MS. ESTES: It goes to the breach of the duty point.

THE COURT: All right. You are going to get a lot of answers later today when you get this charge. What else?

MS. MERMELSTEIN: This is an easy one, your Honor. Page 50, on the right to see the exhibits, you say, "You are about to go into the jury room and begin your deliberations. The exhibits that were received into evidence will be provided to you in the jury room. If you would like to review them, you should make the request." I thought we were sending everything back to them.

THE COURT: Yes.

MS. MERMELSTEIN: In which case they need not make a request.

THE COURT: That's right. I'll take out that third sentence.

MS. MERMELSTEIN: Just so it is clear to them, it may be worth explaining that with respect to larger exhibits that are difficult to print, we have gotten a clean laptop and we have loaded those, and I have here from the defendants theirs. We'll put them all in one place. We have to exchange exhibit lists for the jury, but we will note on the exhibit list that we give them what is on the laptop so they can find it. I think some explanation about that so they are not confused about where things are is worth giving. I don't care what the language is.

THE COURT: Some explanation of the fact that some are on a laptop?

MS. MERMELSTEIN: Yes. Just that we are going to send

you a laptop that contains things that can't be printed, the exhibit list will tell you what is on the laptop.

THE COURT: So there will be a laptop.

MS. MERMELSTEIN: There will be a laptop. It will contain things that can't be put in hardcopy, things like voicemails that are audio, things that are enormously large such as phone records that are a thousand pages. And we will indicate on the list we give to the jury what exhibits are not in hardcopy so if they want to look at them, they know where to find them.

THE COURT: Got it. I'll add that.

MR. WEDDLE: Your Honor, I have two other items before we get all the way to page 50. One is we drafted a statement of the defense for Mr. Wada that we would propose in lieu of the second sentence that your Honor has on page 47 under the heading labeled "U."

In addition, your Honor, we request a multiple conspiracies charge. I think there is a clear factual predicate for it here. I think it is fair argument for us to say there may be no agreements here, on the other hand there may be multiple different agreements that are at divergent purposes. The jury should be instructed that in order to convict, they have to find that the government has proven the conspiracy charged in the case, just as they have to prove the scheme charged in the case.

THE COURT: What is your theory of the defense instruction? Is it lengthy? And is there going to be one from the Middendorf team?

MS. LESTER: No, your Honor, not beyond what is in here right now. We would like the sentence about acting in good faith at all times, but we have no additional instruction.

THE COURT: You don't want that as to you?

MR. WEDDLE: Ours is slightly different, your Honor, partly because of this workplace rule issue. It is not for me to say, but if the first sentence is "Mr. Middendorf and Mr. Wada deny the government's allegations," I think that is fine. Then, if the second sentence is "Mr. Middendorf maintains that he acted in good faith at all times and without the intend alleged in each count of the indictment," that's fine.

Ours is three sentences. I can read it. I thought I had a printout here. We could email it to chambers.

THE COURT: Why don't you read it.

MR. WEDDLE: "Defendant Wada contends that the government has failed to prove beyond a reasonable doubt that he was the source of inspection list information obtained by Brian Sweet in 2015, March 2016, January 2017, or February 2017."

(Continued on next page)

THE COURT: OK. That's sentence one.

MR. WEDDLE: That's sentence one.

Sentence two is: "Mr. Wada further contends that he was not a member of any agreement to embezzle and misuse confidential PCAOB information to improve KPMG's inspection results."

THE COURT: Could you repeat that, please?

MR. WEDDLE: "Mr. Wada further contends that" -- and here I have a series of clauses. So, the first clause is: "He was not a member of any agreement to embezzle and misuse confidential PCAOB information to improve KPMG's inspection results," comma.

THE COURT: "Confidential PCAOB information" -- after "information"?

MR. WEDDLE: "To improve KPMG's inspection results."

THE COURT: OK.

MR. WEDDLE: Comma, "that there was no such scheme to defraud," comma, "and that he it not participate in any such scheme to defraud."

THE COURT: "In any such scheme to defraud," OK.

MR. WEDDLE: And the last sentence is: "As to Count One, Mr. Wada further contends that the government has failed to prove any purpose on his part" --

THE COURT: OK.

MR. WEDDLE: -- "directed at impairing or impeding the

United States in any way."

THE COURT: OK. Got it.

MR. WEDDLE: Thank you.

THE COURT: Going back for a second, I think the Middendorf team had asked on the aiding and abetting charge, to say "willfully and knowingly with intent to defraud," adding "intent to defraud" to the "aiding and abetting," am I right about that.

MS. LESTER: In our proposed requests?

THE COURT: Yes.

MS. LESTER: I have to look at it a moment.

MR. WEDDLE: I thought it was in your letter also of March 4th.

MS. LESTER: Oh, yes, we did.

THE COURT: I didn't hear that one. Is that something the government addressed or wanted to address? Do you have any position?

MS. MERMELSTEIN: No, your Honor.

MS. LESTER: As we stated in our letter, your Honor, we think that it has to be clear to the jury that the aider and abettor must have the same mens rea as the principal. That is why we asked that that be included.

THE COURT: OK.

MS. LESTER: I should just note for the record that there were some very more minor objections that I made in my

letter that I haven't stated orally but I would just preserve those as --

THE COURT: Yes.

MS. LESTER: -- I know that the Court has read the letter.

THE COURT: Yes.

OK. Going back to the defense, so I'll start with: "Mr. Middendorf and Mr. Wada deny the government's allegations. Mr. Middendorf maintains that he acted in good faith at all times and without the intent alleged in each count of the Indictment." And then Mr. Wada contends the three sentences proposed by Mr. Weddle.

Does the government have any issues with any of that?

MS. MERMELSTEIN: No, your Honor.

THE COURT: And anything else?

MS. MERMELSTEIN: I guess one bigger picture question, your Honor, which is I think that the biggest issue, it seems to me, is the wire fraud instruction at this point. And I am a little concerned that we just aren't going to -- there is so much in the mix now that I wonder if we are going to need the opportunity to be heard after we have seen what the sort of final-final charge is. In particular, as we mull it over, I worry that trying to meld the charges that exists -- the charges the government requested with kind of the basic Sand is going to be confusing and conceivably inaccurate in that, for

example, there is no need, as this case has been charged, for there to be proof that Mr. Middendorf made a misrepresentation or that Mr. Middendorf had a duty. And so, I don't think I have any particular requests until we see where your Honor lands. It is hard to say what is or isn't a problem.

THE COURT: After our last discussion, I was just saying, you know, I am not sure how this is going to be cobbled together, because the government has sort of proposed the standard fraud instruction, but the misstatement stuff isn't relevant, I don't think. And then you object to the inclusion of embezzlement, although you included a piece of embezzlement. I don't know what the government wants in terms of a charge in a single place that makes sense.

MS. MERMELSTEIN: I mean, I think what we want is what's in our requests to charge, your Honor, and I think that it is not that we object to the inclusion of embezzlement language, which we certainly think is appropriate, it is that we think that the charge should track the scheme that is charged in the Indictment, which is to say that as defined in the "to wit" clause, it is a scheme to misappropriate, embezzle, use the confidential information in the way specified. And so I hear you that there has been a lot of fighting about it and it is a complicated issue, but that's what we think is the appropriate charge and not to just give like the kind of classic wire fraud Sand that's hard to map

onto the facts here.

THE COURT: What if I include the generic scheme to defraud language but not any of the stuff about misrepresentations? Or do you think we need that?

MS. MERMELSTEIN: I think that might be fine, but I struggle to agree that that's going to be fine. Until it has been synthesized it is hard to say that we're going to agree at the end of the day. So I'm not I don't have a proposal exactly, only a concern that this will not be a case where when we get the final charge we say, OK, we lost some and won some and we're ready to go, but that we think there is more to say. I don't know what to say about that.

MR. BOXER: I was only going to request that we have closure today, and not 9 o'clock tomorrow morning, so that we know where we are.

MS. MERMELSTEIN: That also seems fair.

THE COURT: That was the idea.

MS. LESTER: Your Honor, in our proposed requests to charge we did try to start with the Sand instruction and then add embezzlement as part of the definition of what the fraud could be, because we think that is how the case was charged.

The government's proposed charge on the second element did not come from Sand. It says it is an amalgamation of cases. And we think, you know, based on what the government just said, it seems clear that they want to use the "to wit"

clause as if it replaces the statutory language, which we think is not correct.

And so, I mean, I agree with Ms. Mermelstein that it may be that both parties really need to be heard further, but I think at this point your Honor clearly understands where both parties stand. It's just a question of how to cobble it together, as the Court put it.

But I would suggest for the Court's consideration our propose charge with respect to the second element in particular, because that is what we tried to do in that we started with Sand and then added the embezzlement language.

THE COURT: So, I mean, I'll turn the draft around and get it to you all as soon as I can. I think I will try to send you a black line version and a clean version, whichever is easier for you to look at. And then I don't know that -- I think we could schedule another charge conference at 6, or something, or we could just -- are you saying that -- I still want to do closings at 9 a.m., if we can.

MS. MERMELSTEIN: So do we, your Honor.

THE COURT: So are you suggesting that we might have to revisit after the closings or today?

MS. MERMELSTEIN: I'm not really sure what I am suggesting, only that I have this concern that it is not going to be the normal kind of charge where we say, well, we wanted -- we didn't like the defense instruction on this and

they didn't want conscious avoidance, so like you have ruled and here we are and then it is going to feel like there is more to say. I don't know. I guess when we get it, if we feel that we absolutely have to be heard again, we will let your Honor know and we can cross that bridge.

THE COURT: OK. Fair enough.

MR. WEDDLE: And just to make a pitch, your Honor, for the instruction that we submitted, what we did is we took Ms. Lester's instruction, which is, as she said, based on Sand and then adds some important issues that the jury should be instructed on, and then we just added to that a couple of additional issues that we think are, as I've said, the flip side of what Ms. Lester's argument is. So it starts from Sand. It incorporates what Ms. Lester says. In part, it is shorter than what Mr. Middendorf has submitted on the end of the embezzlement, and then it adds the misuse piece of the scheme that I have talked at length about.

THE COURT: OK.

MS. LESTER: The one final thing, your Honor, is the verdict form. The government had submitted a propose verdict form.

THE COURT: Oh, yeah, I meant to ask about that.

MS. LESTER: We don't have a problem with it in terms of format except that we would request that "not guilty" come first and that "guilty" be the second line.

THE COURT: Any issue with that?

MS. MERMELSTEIN: Your Honor, this request hits me every time.

THE COURT: I have done it that way.

MS. MERMELSTEIN: I think the standard is "guilty" first and "not guilty" second. I think that is the way people talk when we say "guilty or not guilty," and we don't say "not guilty or guilty." So it is the more logical rendition. It tracks what the jury expects to see. I don't think there is any reason to change it. I think that that is the greater weight of tradition in this building, and I don't think there is reason to change it. Your Honor will do whatever your Honor thinks is right.

MR. BOXER: Your Honor, our suggestion reflects the burden of proof and so they have to have overcome that burden right up until the verdict.

THE COURT: That is fine. I have done it -- I think I have, when it has been requested, I put "not guilty" first just because, you know, irrespective of tradition, it is the default, and I think it seems fine to put "not guilty" first. So, I will do that.

Other than that, I assume the general verdict form is fine. I will have the foreperson sign and date.

Anything else?

We'll send something to you as soon as we can and

then, you know, we'll see what happens.

MS. MERMELSTEIN: Thank you, your Honor.

THE COURT: All right. So, closings tomorrow at 9 a.m.

OK. Have a good day.

MS. MERMELSTEIN: You, too.

(Adjourned to 9 a.m. March 7, 2019)